

MEDICAL CONTESTED CASE HEARING NO. 12105
M6-12-39322-01

DECISION AND ORDER

This case is decided pursuant to Chapter 410 of the Texas Workers' Compensation Act and Rules of the Division of Workers' Compensation adopted thereunder.

ISSUE

A contested case hearing was held on April 24, 2012, to decide the following disputed issue:

Is the preponderance of the evidence contrary to the decision of the Independent Review Organization (IRO) that Claimant is entitled to 80 hours of a work hardening (WH) program for the compensable injury of (Date of Injury)?

PARTIES PRESENT

Petitioner/Carrier appeared and was represented by JM, attorney. Respondent appeared and was represented by ML, attorney. Claimant was assisted by MP, ombudsman.

BACKGROUND INFORMATION

Claimant, a bus driver/teacher's aide, sustained a compensable right shoulder contusion, left lower leg contusion, and right knee traumatic suprapatellar bursitis injury on (Date of Injury). A Decision and Order under Docket No. (Docket Number) was signed and entered October 3, 2011, wherein Claimant and Carrier agreed that Claimant's compensable injury of (Date of Injury), did not extend to and include a right medial meniscus tear. Claimant has undergone a right knee aspiration procedure, six sessions of physical therapy, individualized psychotherapy sessions, and prescribed medication for her compensable injury. Claimant has not undergone surgery. Dr. K, M.D., is Claimant's treating doctor and is Respondent's medical director. On December 27, 2011, Respondent recommended that Claimant undergo 80 hours of a WH program for the compensable injury. Petitioner's utilization review (UR) denied Respondent's request, and Respondent requested an IRO review.

DISCUSSION

Texas Labor Code §408.021 provides that an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. Health care reasonably required is further defined in Texas Labor Code Section 401.011 (22a) as health care that is clinically appropriate and considered effective for the injured employee's injury and provided in accordance with best practices consistent with evidence-based medicine or, if evidence-based medicine is not available, then generally accepted standards of medical

practice recognized in the medical community. Health care under the Texas Workers' Compensation system must be consistent with evidence-based medicine if that evidence is available. Evidence-based medicine is further defined in Texas Labor Code §401.011 (18a) to be the use of the current best quality scientific and medical evidence formulated from credible scientific studies, including peer-reviewed medical literature and other current scientifically based texts and treatment and practice guidelines in making decisions about the care of individual patients. The Commissioner of the Division of Workers' Compensation is required to adopt treatment guidelines that are evidence-based, scientifically valid, outcome-focused and designed to reduce excessive or inappropriate medical care while safeguarding necessary medical care. Texas Labor Code §413.011(e). Medical services consistent with the medical policies and fee guidelines adopted by the commissioner are presumed reasonable in accordance with Texas Labor Code §413.017(1).

In accordance with the above statutory guidance, the Division of Workers' Compensation has adopted treatment guidelines by Division Rule 137.100. This rule directs health care providers to provide treatment in accordance with the current edition of the Official Disability Guidelines (ODG), and such treatment is presumed to be health care reasonably required as defined in the Texas Labor Code. Thus, the focus of any health care dispute starts with the health care set out in the ODG. Also, in accordance with Division Rule 133.308 (t), "A decision issued by an IRO is not considered an agency decision and neither the Department nor the Division are considered parties to an appeal. In a Contested Case Hearing (CCH), the party appealing the IRO decision has the burden of overcoming the decision issued by an IRO by a preponderance of evidence-based medical evidence."

With regard to admission to a WH program, the ODG provides the following criteria:

- "(1) *Prescription*: The program has been recommended by a physician or nurse case manager, and a prescription has been provided.
- (2) *Screening Documentation*: Approval of the program should include evidence of a screening evaluation. This multidisciplinary examination should include the following components:
 - (a) History including demographic information, date and description of injury, history of previous injury, diagnosis/diagnoses, work status before the injury, work status after the injury, history of treatment for the injury (including medications), history of previous injury, current employability, future employability, and time off work;
 - (b) Review of systems including other non work-related medical conditions;
 - (c) Documentation of musculoskeletal, cardiovascular, vocational, motivational, behavioral, and cognitive status by a physician, chiropractor, or physical and/or occupational therapist (and/or assistants);

- (d) Diagnostic interview with a mental health provider;
 - (e) Determination of safety issues and accommodation at the place of work injury. Screening should include adequate testing to determine if the patient has attitudinal and/or behavioral issues that are appropriately addressed in a multidisciplinary work hardening program. The testing should also be intensive enough to provide evidence that there are no psychosocial or significant pain behaviors that should be addressed in other types of programs, or will likely prevent successful participation and return-to-employment after completion of a work hardening program. Development of the patient's program should reflect this assessment.
- (3) *Job demands*: A work-related musculoskeletal deficit has been identified with the addition of evidence of physical, functional, behavioral, and/or vocational deficits that preclude ability to safely achieve current job demands. These job demands are generally reported in the medium or higher demand level (i.e., not clerical/sedentary work). There should generally be evidence of a valid mismatch between documented, specific essential job tasks and the patient's ability to perform these required tasks (as limited by the work injury and associated deficits).
 - (4) *Functional capacity evaluations (FCEs)*: A valid FCE should be performed, administered and interpreted by a licensed medical professional. The results should indicate consistency with maximal effort, and demonstrate capacities below an employer verified physical demands analysis (PDA). Inconsistencies and/or indication that the patient has performed below maximal effort should be addressed prior to treatment in these programs.
 - (5) *Previous PT*: There is evidence of treatment with an adequate trial of active physical rehabilitation with improvement followed by plateau, with evidence of no likely benefit from continuation of this previous treatment. Passive physical medicine modalities are not indicated for use in any of these approaches.
 - (6) *Rule out surgery*: The patient is not a candidate for whom surgery, injections, or other treatments would clearly be warranted to improve function (including further diagnostic evaluation in anticipation of surgery).
 - (7) *Healing*: Physical and medical recovery sufficient to allow for progressive reactivation and participation for a minimum of 4 hours a day for three to five days a week.
 - (8) *Other contraindications*: There is no evidence of other medical, behavioral, or other comorbid conditions (including those that are non work-related) that prohibits participation in the program or contradicts successful return-to-work upon program completion.

- (9) *RTW plan*: A specific defined return-to-work goal or job plan has been established, communicated and documented. The ideal situation is that there is a plan agreed to by the employer and employee. The work goal to which the employee should return must have demands that exceed the claimant's current validated abilities.
- (10) *Drug problems*: There should be documentation that the claimant's medication regimen will not prohibit them from returning to work (either at their previous job or new employment). If this is the case, other treatment options may be required, for example a program focused on detoxification.
- (11) *Program documentation*: The assessment and resultant treatment should be documented and be available to the employer, insurer, and other providers. There should be documentation of the proposed benefit from the program (including functional, vocational, and psychological improvements) and the plans to undertake this improvement. The assessment should indicate that the program providers are familiar with the expectations of the planned job, including skills necessary. Evidence of this may include site visitation, videotapes or functional job descriptions.
- (12) *Further mental health evaluation*: Based on the initial screening, further evaluation by a mental health professional may be recommended. The results of this evaluation may suggest that treatment options other than these approaches may be required, and all screening evaluation information should be documented prior to further treatment planning.
- (13) *Supervision*: Supervision is recommended under a physician, chiropractor, occupational therapist, or physical therapist with the appropriate education, training and experience. This clinician should provide on-site supervision of daily activities, and participate in the initial and final evaluations. They should design the treatment plan and be in charge of changes required. They are also in charge of direction of the staff.
- (14) *Trial*: Treatment is not supported for longer than 1-2 weeks without evidence of patient compliance and demonstrated significant gains as documented by subjective and objective improvement in functional abilities. Outcomes should be presented that reflect the goals proposed upon entry, including those specifically addressing deficits identified in the screening procedure. A summary of the patient's physical and functional activities performed in the program should be included as an assessment of progress.
- (15) *Concurrently working*: The patient who has been released to work with specific restrictions may participate in the program while concurrently working in a restricted capacity, but the total number of daily hours should not exceed 8 per day while in treatment.

- (16) *Conferences*: There should be evidence of routine staff conferencing regarding progress and plans for discharge. Daily treatment activity and response should be documented.
- (17) *Voc rehab*: Vocational consultation should be available if this is indicated as a significant barrier. This would be required if the patient has no job to return to.
- (18) *Post-injury cap*: The worker must be no more than 2 years past date of injury. Workers that have not returned to work by two-years post injury generally do not improve from intensive work hardening programs. If the worker is greater than one-year post injury a comprehensive multidisciplinary program may be warranted if there is clinical suggestion of psychological barrier to recovery (but these more complex programs may also be justified as early as 8-12 weeks, see Chronic pain programs).
- (19) *Program timelines*: These approaches are highly variable in intensity, frequency and duration. APTA, AOTA and utilization guidelines for individual jurisdictions may be inconsistent. In general, the recommendations for use of such programs will fall within the following ranges: These approaches are necessarily intensive with highly variable treatment days ranging from 4-8 hours with treatment ranging from 3-5 visits per week. The entirety of this treatment should not exceed 20 full-day visits over 4 weeks, or no more than 160 hours (allowing for part-day sessions if required by part-time work, etc., over a longer number of weeks). A reassessment after 1-2 weeks should be made to determine whether completion of the chosen approach is appropriate, or whether treatment of greater intensity is required.
- (20) *Discharge documentation*: At the time of discharge the referral source and other predetermined entities should be notified. This may include the employer and the insurer. There should be evidence documented of the clinical and functional status, recommendations for return to work, and recommendations for follow-up services. Patient attendance and progress should be documented including the reason(s) for termination including successful program completion or failure. This would include noncompliance, declining further services, or limited potential to benefit. There should also be documentation if the patient is unable to participate due to underlying medical conditions including substance dependence.
- (21) *Repetition*: Upon completion of a rehabilitation program (e.g., work conditioning, work hardening, outpatient medical rehabilitation, or chronic pain/functional restoration program) neither re-enrollment in nor repetition of the same or similar rehabilitation program is medically warranted for the same condition or injury.”

The IRO reviewer was identified as a medical doctor who was board certified in anesthesiology and pain management. The IRO determined that the requested 80 hours of a WH program for the compensable injury was medically necessary because Claimant met the ODG criteria.

Petitioner appealed the IRO decision. Petitioner contended that Claimant did not meet the ODG criteria, and that the determination of the IRO was incorrect. Claimant testified that she believed the 80 hours of the WH program would enable her to return to her pre-injury job. Claimant admitted that she had returned work as a bus driver for a different employer, but was working less hours and was unable to perform the duties of a teacher's aide.

Dr. N, M.D., testified on behalf of Petitioner. Dr. N testified that she specialized in family practice medicine and occupational medicine and had been in practice for eighteen years. Dr. N further testified that she had reviewed Claimant's medical records and previously performed a UR concerning Respondent's request for the 80 hours of the WH program for Claimant. Dr. N noted that Respondent had indicated that Claimant's physical demand level (PDL) was light duty as of December 27, 2011, when Respondent requested the 80 hours of a WH program for Claimant. Dr. N further noted that Claimant's pre-injury job skills classification as a bus driver/teacher's aide was medium duty PDL and that the functional capacity evaluations performed on June 15, 2011, and December 20, 2011, indicated that Claimant was performing at least at the medium duty job level and could return to work without restrictions as of December 20, 2011. Dr. N stated that Claimant did not meet criteria number three of the ODG for a WH program because there was no evidence based on the two functional capacity evaluations of a valid mismatch between documented, specific essential job tasks and Claimant's ability to perform these required tasks as limited by the work injury and associated deficits. Dr. N further stated that the functional capacity evaluation (FCE) performed on December 20, 2011, indicated that Claimant gave less than consistent and maximum effort during the FCE, and that the results demonstrated that Claimant was able to perform at a medium duty PDL. Dr. N opined that the FCE on December 20, 2011, revealed inconsistencies and/or an indication that Claimant had performed below the maximal effort during the FCE, and that the inconsistencies should be addressed prior to undergoing the WH program. Dr. N further opined that Claimant did not meet criteria number four of the ODG for a WH program. Dr. N stated that her opinions were based on reasonable medical probability, evidence-based medicine, and the ODG.

Based on the evidence, Petitioner met its burden of proof of overcoming the IRO decision by a preponderance of evidence-based medical evidence. The preponderance of the evidence-based medical evidence is contrary to the decision of the IRO that 80 hours of a WH program is health care reasonably required for the compensable injury of (Date of Injury). There was no objection to the testimony, reports, or qualifications of any doctor or witness.

Even though all the evidence presented was not discussed, it was considered. The Findings of Fact and Conclusions of Law are based on all of the evidence presented.

FINDINGS OF FACT

1. The parties stipulated to the following facts:

- A. Venue is proper in the (City) Field Office of the Texas Department of Insurance, Division of Workers' Compensation.
 - B. On (Date of Injury), Claimant was the employee of (Self-Insured), Employer.
 - C. On (Date of Injury), Employer provided workers' compensation insurance as a Self-Insurer.
 - D. Claimant sustained a compensable right shoulder contusion, left lower leg contusion, and right knee traumatic suprapatellar bursitis injury on (Date of Injury).
 - E. The Independent Review Organization determined that Claimant is entitled to 80 hours of a work hardening program for the compensable injury of (Date of Injury).
2. Carrier delivered to Respondent a single document stating the true corporate name of Carrier, and the name and street address of Carrier's registered agent, which document was admitted into evidence as Hearing Officer's Exhibit Number 2A.
 3. Carrier delivered to Claimant a single document stating the true corporate name of Carrier, and the name and street address of Carrier's registered agent, which document was admitted into evidence as Hearing Officer's Exhibit Number 2B.
 4. The preponderance of the evidence-based medical evidence is contrary to the determination of the Independent Review Organization.
 5. The requested 80 hours of a work hardening program is not health care reasonably required for Claimant's compensable injury of (Date of Injury).

CONCLUSIONS OF LAW

1. The Texas Department of Insurance, Division of Workers' Compensation, has jurisdiction to hear this case.
2. Venue is proper in the (City) Field Office.
3. The preponderance of the evidence is contrary to the decision of the Independent Review Organization that 80 hours of a work hardening program is health care reasonably required for the compensable injury of (Date of Injury).

DECISION

Claimant is not entitled to 80 hours of a work hardening program for the compensable injury of (Date of Injury).

ORDER

Carrier is not liable for the benefits at issue in this hearing. Claimant remains entitled to medical benefits for the compensable injury of (Date of Injury), in accordance with Texas Labor Code Ann. §408.021.

The true corporate name of the insurance carrier is (**SELF-INSURED**), and the name and address of its registered agent for service of process is

**SELF-INSURED
(STREET ADDRESS)
(CITY), TEXAS (ZIP CODE)**

Signed this 2nd day of May, 2012.

Wes Peyton
Hearing Officer